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In the

Supreme Court of the United States

October Term, 1974

No. 74-1254

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION AFL-CIO
AND
MARITIME LOCAL NO. 8-801 OF
OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION AFL-CIO,
Petitioners,

v.

MOBIL OIL CORPORATION,
MARINE TRANSPORTATION DEPARTMENT,
GULF-EAST COAST OPERATIONS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES W. HAMBRIGHT,
JOHN G. TUCKER,
JOHN CREIGHTON III,
Beaumont Savings Building,
Beaumont, Texas 77701
THEOPHIL C. KAMMHOLZ,
1750 Pennsylvania Ave., N.W.
Washington, D. C. 20006
WARREN H. GREENE, JR.,
150 East 42nd Street,
New York, New York 10017
Counsel for Respondent.

Of Counsel:
ORGAIN, BELL & TUCKER,
Beaumont Savings Building,
Beaumont, Texas 77701,
VEDDER, PRICE, KAUFMAN, KAMMHOLZ & DAY,
1750 Pennsylvania Avenue, N.W.,
Washington, D. C. 20006

STECK-WARLICK

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Petitioners,

v.

MOBIL OIL CORPORATION, MARINE TRANSPORTATION DEPARTMENT, GULF-EAST COAST OPERATIONS,

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals *en banc* is reported at 504 F. 2d 272. The opinion of the three-judge panel is reported at 483 F. 2d 603. The District Court's Findings of

Fact, Conclusions of Law and Judgment are reported at 81 LRRM 2051 and at 1972 A.M.C. 1712. The opinions are reproduced in the Petition for a Writ of Certiorari. (Apps. A, B and D.)[1]

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the court below, in holding that the Texas right to work laws apply to the employment relationship under the collective bargaining agreement between Petitioners and Respondent, properly weighed the various elements of contact such relationship has with the State of Texas in terms of § 14(b) of the Taft-Hartley Act.

2. Whether the court below properly refused to defer to the National Labor Relations Board.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are cited and reproduced in the Petition. (App. C.)

STATEMENT

The collective bargaining agreement between Petitioners and Respondent, Mobil Oil Corporation, Marine Transportation Department, Gulf-East Coast Operations,[2] contains the following agency shop clause:

> "2. UNION SECURITY
>
> b. For the duration of the Agreement all employees hired shall, as a condition of employment, become

[1] References designated as "App....." are to Appendices of the Petition. References designated as "R. App....." are to the Appendix to this Brief.

[2] Petitioners have erroneously denominated Respondent as "Mobil Oil Corporation" in the Petition.

> members of the Union and/or in the alternative pay the regular union dues and initiation fees within thirty-one days from the employment date."

During the term of the agreement, Respondent discovered that agency shop clauses violate Texas right to work laws and sought to conform the agreement to Texas law by deleting the illegal provision. *See* Tex. Att'y. Gen. Op. No. WW-1018 (1961) (R. App., pp. A1-A7, *infra*). However, Petitioners rejected Respondent's request and instead advised all covered employees that failure to make payment of regular dues and fees would result in dismissal. Respondent thereupon filed this action seeking a declaratory judgment that the agency shop clause violated Texas right to work laws.[3]

At trial, Respondent introduced evidence demonstrating the close contact this employment relationship has with Texas. Since 1962 Respondent's headquarters have been located in Beaumont, Jefferson County, Texas. (App. D, pp. 1d-2d.) From its headquarters, Respondent administers the agreement with Petitioners. (App. D, p. 4d.) All grievances filed pursuant to the agreement are submitted to and considered by Respondent's manager at Beaumont. (App. D, p. 3d.) All checkoffs of union dues required by the agreement are forwarded to Petitioners from Texas. (App. D, p. 3d.) All personnel records are maintained at Respondent's Beaumont headquarters. (App. A, p. 3a; App. D, p. 3d.) All payroll checks are written and mailed from Texas. (App. A, p. 3a.) Cash handed Respondent's employees aboard ship is placed on board in Texas. (App. D, p. 3d.)

[3] While § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970), of the Labor Management Relations Act permits union security agreements within certain limits, § 14(b), 29 U.S.C. § 164(b) (1970), of the Labor Management Relations Act allows state right to work laws prohibiting such agreements. Section 14(b) provides:

> "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

All state and federal taxes withheld from personnel employed on Respondent's tankers are remitted from Texas. (App. D, p. 3d.) Texas is the only state collecting unemployment compensation on all personnel employed aboard Respondent's tankers; Texas does so regardless of the designation of home address or shipping port. (App. D, p. 2d.)

Respondent employs 289 seafaring employees (App. D, p. 2d.); 152 of them have requested Respondent to list Beaumont, Texas, as their shipping port. (App. D, p. 3d.) One hundred twenty-three of Respondent's seafaring employees have reported to Respondent that Texas is their state of residence. (App. D, p. 2d-3d.) Sixty percent of all applicants for employment make their initial applications in Texas (App. A, p. 4a.); all final employment decisions are made at Respondent's Beaumont headquarters. (App. D, p. 3d.) All final decisions to terminate employees are made in Beaumont. (App. A, p. 4a.)

Since many voyages begin or end at Texas ports, seamen employed on Respondent's tankers are regularly present in Texas. (App. D, p. 3d-4d.) At all times some of Respondent's seamen are present in Texas, either on board Respondent's tankers or on paid vacation. (App. D, p. 4d.)

Respondent's periodic employee news letter, which is entitled *Mobil Mariner*, is printed, published and datelined in Beaumont, Texas, and it is mailed from that city. Respondent issues to newly employed seamen a booklet entitled WELCOME ABOARD! which is written and published in Texas and which recites that the mailing address of such employees will be "John Doe, S/S 'Name of Ship', Mobil Oil Corporation, Gulf-East Coast Operations, P. O. Box 3444, Beaumont, Texas 77704" while employed by Respondent.

On the basis of these facts, the District Court concluded that Texas right to work laws applied to the agreement between Petitioners and Respondent and that the agency shop clause in the agreement was therefore void and unenforceable. A three-judge panel of the Court of Appeals reversed,

stating that the District Court "failed to give proper consideration to the most important factor in the case, that is, the situs of the work performance of the covered employees." (App. B, p. 11b.) On rehearing *en banc* the judgment of the three-judge panel was reversed and that of the District Court affirmed.

The opinion of the *en banc* court concluded that the contacts between the employment relationship and Texas "demonstrate that the state of Texas is intimately involved with the employment relationship." (App. A, p. 4a.) The court then framed the question presented for review:

> "Whether the agency shop clause in this collective bargaining agreement is valid or not depends entirely upon whether the Texas right to work law applies to *this* employment relationship. In determining whether the Texas law is applicable, we must decide whether it was the intent of Congress in writing section 14(b) to permit a state to apply its right to work law *to an employment relationship which has contacts with the state as described by the evidence presented to the district court.*" (App. A, 6a; footnote omitted; emphasis added.)

The court determined that the contacts between this employment relationship and Texas, when viewed on a multidimensional level in terms of the actions of Congress in enacting § 14(b) and in amending certain provisions of the Railway Labor Act hereinafter discussed as well as the relative interests of jurisdictions other than Texas, warranted the application of Texas right to work laws to the relationship. Section 14(b) reserved to the states the right to prohibit compulsory unionism, including the agency shop. *Retail Clerks International Association v. Schermerhorn*, 373 U.S. 746 (1963). In authorizing action by the states, the concern of Congress was with the hiring process, not with job situs. Section 14(b) looks to the "execution or application" of union security agreements in hiring rather than to the situs of the job to be performed.

The court below concluded that a state may apply its right to work law to an employment relationship whenever it has a significant interest in the employment relationship; the court also concluded that the contacts between this employment relationship and Texas predominated over those with any other state and gave Texas a significant interest in applying its right to work laws. Indeed, allowing Texas to apply its right to work laws to this employment relationship would further national policy.

The *en banc* court rejected the view of the three-judge panel that "the predominance of Texas contacts with *this employment relationship* was not decisive" and "that the determinative factor in deciding whether the Texas law is applicable is job situs." (App. A, p. 5a; emphasis added.) Furthermore, should it refuse to allow Texas to apply its right to work laws to this employment relationship, the court believed it would be carving out a special exemption for the maritime industry, for when Congress meant to authorize union security agreements regardless of any state law, it expressly did so by means of specific statutory language. *See* Railway Labor Act, 45 U.S.C. § 151 *et seq.* (1970).

Finally, the *en banc* court affirmed the decision of the three-judge panel that the District Court properly declined to defer consideration of the issues in this case to the National Labor Relations Board.

ARGUMENT

I. The decision of the court below on the issue of the applicability of Texas right to work laws does not present a question of substantial importance appropriate for review by this Court.

The opinion of the *en banc* court below was carefully limited to the particular employment relationship existing between Petitioners and Respondent, as manifested by its narrowly circumscribed conclusion "that it was not the intent of the Congress to prevent Texas from applying its right to work law *in the context of this employment relationship.*"

(App. A, p. 7a; emphasis added.) This case is, therefore, not appropriate for consideration by this Court.

The decision of the court below resulted from the weighing of the various contacts between this particular employment relationship and Texas. The difference among the members of the *en banc* court is merely the weight to be accorded the various contacts. The reweighing of these factors is not a matter requiring the attention of this Court.

Because the decision of the *en banc* court depended on the weighing of the various contacts between the state of Texas and this employment relationship, it is of highly limited applicability in the context of other employment relationships. Thus the assertion by Petitioners that this case is important because it will apply to 10,000 men and 500 ships is patently incorrect.[4] Similarly, the Petitioners' assertion that the decision of the court below is important because it gives precedence to the laws of right to work states over those states without such laws, ignores the fact that the court below looked to the contacts between the state of Texas and this particular employment relationship. In another case, using the same approach, the laws of a state that permitted union security agreements would be applied if, as here, it were demonstrated that sufficient contacts existed between that state and the particular employment

[4] Petitioners would have this Court pursue a phantom when they speak of 10,000 men on 500 ships. As the courts below took note, this is not a "hiring hall" case. Typically, a maritime employee over a period of years will ship out of many different hiring halls and sail aboard the vessels of many different companies, with no particular allegiance to (nor permanent benefits from) any one employer. See *NLRB v. Seafarers International Union*, 496 F. 2d 1363 (5th Cir. 1974). Not so in the case at bar, where there is a *permanent* workforce which is employed by a Texas employer and which enjoys until retirement age the advantages of a lasting relationship. Between cruises the employee in this case is not sitting in a union hiring hall hoping to get another job; the employee remains an employee of Respondent, draws a salary from Texas, and enjoys a vacation while awaiting word from Texas as to the next vessel assignment.

relationship involved. This case therefore presents no question of significance warranting consideration by this Court.[5]

II. The decision of the court below on the issue of the applicability of Texas right to work laws is not in conflict with prior decisions of this Court.

The decision below does not conflict with this Court's decision in *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963). There this Court held that an employer in a state *not* having a right to work law commits an unfair labor practice by refusing to bargain over inclusion of an agency shop clause in a collective bargaining agreement. Nothing in the decision in *this* case is addressed to an employer's bargaining obligation; it deals only with the legality of one particular clause. Further, contrary to Petitioners' assertion, the decision below did not demonstrate a preference for right to work laws that would trench upon the right of unions to bargain for agency shop clauses. Rather, the decision of the court below to apply the laws of Texas to invalidate this particular agency shop clause was based on an analysis of the various contacts between Texas and this particular employment relationship. Lastly, the decision below is consistent with *Retail Clerks International Association v. Schermerhorn*, 373 U.S. 746 (1963), decided the same day as *General Motors*, where this Court held that the states, in the exercise of the power permitted them under § 14(b), could declare agency shop clauses invalid. The court below merely gave effect to a state statute exercising the authority recognized in *Schermerhorn*. For these reasons, the decision of the court below does not conflict with any decision of this Court.

III. The decision of the court below on the issue of the applicability of Texas right to work laws is correct on the merits.

The decision below is mandated by § 14(b). The court considered all the various contacts between this employment

[5] In fact, Petitioners apparently considered this case of little "significance" for they failed to file a brief with the court below in the *en banc* proceedings although the opportunity was made available for them to do so.

relationship and Texas in determining that Texas right to work laws applied to invalidate the agency shop clause in the agreement between Respondent and Petitioners. The court refused to accord decisive weight in this case to job situs. The court's weighing of all aspects of the employment relationship is required by the literal words and legislative history of § 14(b). Section 14(b) states that the Labor Management Relations Act "shall not be construed as authorizing the *execution or application* of agreements requiring membership in a labor organization in any State * * * in which such *execution or application* is prohibited by state law * * *" (emphasis added). Concentration on one particular aspect of the employment relationship ignores the fact that union security agreements are applied in diverse factual circumstances involving many different aspects of the employment relationship. As the court below pointed out, the underlying legislative history supports this interpretation of § 14(b). (App. A, pp. 13a-14a.)

Moreover, the approach urged by Petitioners would result in exempting seafaring employees from § 14(b). All provisions of the Labor Management Relations Act apply to seafaring employees; nothing in § 14(b) indicates it was not to be applied to seafaring employees. When Congress intended to prevent the application of state right to work laws to employees covered by the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (1970), it did so by explicit statutory language.[6]

[6] Section 2, Eleventh, 45 U.S.C. § 152(11) (1970), of the Railway Labor Act provides:

> Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted —
>
> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is later, all employees shall become members of the labor organization representing their craft or class * * *.

Adopting the reasoning of Petitioners would require the judicial creation of an exception to § 14(b) that Congress declined to make. The exceptional status occupied by seamen under maritime law does not require a different result.[7]

The decision below does not sanction forum shopping or headquarters manipulation. The approach utilized in the decision below negates the possibility of any such abuses since the court looked to all aspects of the employment relationship in deciding to apply Texas law; headquarters location alone was not determinative. There is not a scintilla of evidence that Respondent's headquarters move to Beaumont in 1962 was designed to obtain the benefit of the Texas right to work laws or that Respondent arbitrarily structured its operations for that purpose. As was said in the decision below:

> "[W]here an employer has artificially constructed its operations or its hiring process in such a way that the substance of its activities occurs in and the greatest part of its labor force comes from a non-right to work jurisdiction while a pro forma final hiring decision is made in a right to work state, application of the state's right to work law would be contrary to the national labor policy. *We are not faced with that circumstance here.*" (App. A, p. 18a; emphasis added)

Finally, the decision below does not conflict with the decisions of the National Labor Relations Board in *Western Electric Co., Inc.*, 84 NLRB No. 111 (1949); *Northland Greyhound Lines, Inc.*, 80 NLRB No. 60 (1949); and *Giant Food Shopping Center, Inc.*, 77 NLRB No. 79 (1948). In those cases the question presented was not whether some state law applied, but which law of more than one state applied.[8]

For these reasons the decision below is indisputably correct and need not be reviewed by this Court.

IV. The decision of the court below on the issue of deferral to the National Labor Relations Board is not appropriate for consideration by this Court.

Deferral to the National Labor Relations Board, contrary to the position of Petitioners, is unwarranted in this case, which involves the construction, interpretation and validity of the agency shop clause of a collective bargaining agreement. Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1970), expressly vests this function in the courts; and this Court has approved the exercise by courts of the jurisdiction conferred by § 301 even though the relief sought could also be obtained in an unfair labor practice proceeding. See *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 513 (1962), where this Court stated that "Congress deliberately chose to leave the enforcement of collective agreements to the 'usual processes of the law.'"[9]

While deferral to an administrative agency has been held proper to provide the courts with the benefit of greater ad-

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[7] Moreover, in the recent case of *Cady v. Twin Rivers Towing Company*, 486 F. 2d 1335 (3d Cir. 1973), the Third Circuit made the following comments with respect to the "exceptional" status of seamen in actions brought under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1970):

> "We are not aware of any cases to support the proposition that seamen suing under collective bargaining agreements are accorded special rights. On the contrary, principles developed under Section 301(a) have been held to apply to seamen in ways no different from other workers."

Accord, Suissa v. American Export Lines, 367 F. Supp. 1113 (S.D.N.Y. 1973), aff'd ..... F. 2d ..... (2d Cir. 1975).

[8] These cases were only concerned with the determination of the appropriate unit and not with what state law was to be applied in determining the validity of a union security agreement. Moreover, such cases were decided *more than twenty years ago under a statute long since repealed.*

[9] Even if the case were deferred to the Board, there is no guarantee an unfair labor practice charge would issue. The General Counsel of the Board has broad discretion to refuse to issue an unfair labor practice complaint (a discretion which is ordinarily unreviewable) and in such event the jurisdiction of a federal court would be ousted. See *Augspurger v. Brotherhood of Locomotive Engineers*, 510 F. 2d 853 (8th Cir. 1975).

ministrative expertise and in order to promote uniform development of the law, see, e.g., *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411 (1959), deferral is unwarranted here. The Board possesses no greater expertise than the courts in the interpretation of collective bargaining agreements or statutory provisions; both functions are performed daily by the courts. Moreover, even Chief Judge Brown, who filed a dissenting opinion in the Court below, was hard-put to find a labor case to support his view in favor of deferral to the National Labor Relations Board. His championship of "primary jurisdiction" by citation of the ICC and FPC cases requires great strain, when it is recalled that these agencies, unlike the National Labor Relations Board, possess comparatively enormous power and reach of function. They initiate investigations, undertake studies, and habitually on their own volition regulate many of the affairs of industry in this country. Conversely, the NLRB moves only after it has been energized; a party files a charge that an unfair labor practice has been committed, or a party files a petition seeking an election in a group of employees. It is small wonder that, as acknowledged by Petitioners, only 2 out of the 14 federal appellate judges who have heard this case believed that it would have been proper to defer to the Board. And lastly, uniformity of national labor law is not endangered by the decision of the court below. As explained above, the court was applying Texas law only in the context of *this* particular employment relationship.

The refusal of the court below is thus consistent with decisions of this Court and unquestionably sound. Further, even assuming *arguendo* that such refusal was erroneous, the decision not to defer is a matter of minor significance inasmuch as the decision of the court below is limited to the facts of this case, and review of such decision by this Court would be inappropriate.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAMES W. HAMBRIGHT,
JOHN G. TUCKER,
JOHN CREIGHTON III,
THEOPHIL C. KAMMHOLZ,
WARREN H. GREENE, JR.,

Counsel for Respondent.

Dated: May 2, 1975.

APPENDIX

THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

WILL WILSON
ATTORNEY GENERAL

March 14, 1961

HONORABLE DAVID W. RATLIFF, *Chairman*
Labor and Management Relations Committee
Senate of the State of Texas
Austin, Texas

Opinion No. WW-1018

Re: Whether the "agency shop" clause in labor union contracts contravenes Sec. 8a, Article 5154a; Sec. 2, Art. 5207a; and Section 1, Art. 5154g; V.A.T.C.S.

Dear Senator Ratliff:

The Senate Committee on Labor and Management Relations has requested an opinion as follows:

> "Does the 'agency shop' clause contravene existing statutes of the State of Texas by requiring that employees covered by the clause, who fail voluntarily to acquire or maintain membership in the union, as a condition of employment, pay to the union each month a service charge or fee as a contribution toward the administration of the agreement and the representation of such employees?"

Your letter points out that many out-of-state companies have negotiated collective bargaining agreements with various unions containing "agency shop" clauses, which companies have branch plants in Texas, and that some Texas corporations are being pressed to sign contracts containing this clause. Your Committee is interested in this problem to see if corrective legislation is required.

The standard "agency shop" clause in a contract between the union and management requires each employee who fails voluntarily to acquire and maintain membership in the union, as a condition of employment, to pay to the union each month a service charge as a contribution toward the administration of the contract and the representation of such employees. Such service charge is usually in an amount equal to the union's regular initiation fee and a month's dues for the first month after the contract goes into effect, and for each month thereafter in an amount equal to the regular monthly dues.

Section 8a of Article 5154a, Vernon's Civil Statutes, reads as follows:

> "*It shall be unlawful for any labor union,* labor organizer, any officer, any agent, or representative or any member of any labor union to *collect, receive or demand, directly or indirectly, any fee, assessment, or sum of money whatsoever,* as a work permit or *as a condition for the privilege to work from any person not a member of the union;* provided, however, this shall not prevent the collection of initiation fees as above stated." (Emphasis added).

Section 2 of Article 5207a, Vernon's Civil Statutes, reads as follows:

> "No person shall be denied employment on account of membership or nonmembership in a labor union."

Section 1 of Article 5154g, Vernon's Civil Statutes, reads as follows:

> "It is hereby declared to be the public policy of the State of Texas that *the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union* or labor organization *and that in the exercise of such rights all persons shall be free from threats, force, intimidation or coercion.*"

It is clear from a reading of the foregoing statutes that it was the intention of the Legislature to make membership or non-membership in a labor union a voluntary matter with each individual worker, and to protect him in his right to continue to work at his job, regardless of his decision. Section 1 of Article 5154a, V.C.S., reads in part as follows:

> "Because of the activities of labor unions affecting the economic conditions of the country and the State, entering as they do into practically every business and industrial enterprise, it is the sense of the Legislature that such organizations affect the public interest and are charged with a public use. *The working man, unionist, or non-unionist, must be protected. The right to work is the right to live.* (Emphasis added).

The Agency Shop Contract is of fairly recent origin. Heretofore, the three usual types of union security have been: the Closed Shop; the Union Shop; and the Maintenance of Membership Arrangement.

Under the *Closed Shop* contract the employer can hire only union members, and is forced to discharge employees failing to maintain their membership in good standing in the union.

Under the *Union Shop* contract the employer can hire without regard to union membership, but the employee must become a union member within a specified time and thereafter maintain his membership in good standing.

The *Maintenance of Membership Arrangement* allows the employer to hire without regard to union membership or non-membership, but during a specified limited time at the beginning of the contract or of being employed, as the case might be, every employee must decide whether or not he will join or remain a member of the union. Those who choose to join must remain members until the next so-called "escape period" which occurs at the beginning of each contract renewal. However, those employees electing not to join the union are free to remain as non-union employees for the life of the existing collective bargaining agreement.

If it be argued that the Agency Contract does not require any person to become a member of a labor union as a prerequisite to obtaining or holding a job, then let it be noted that Sec. 8a of Article 5154a, *supra*, prohibits the collection of any fee, assessment or sum or money whatsoever as a condition for the privilege to work from any person not a member of the union. Indiana, a right-to-work state, has held that the agency shop is lawful under *its* laws, but did so on the ground that the Indiana right-to-work law is penal in nature, and must, therefore, be strictly construed. There being nothing in the Indiana statute which specifically prohibits the agency contract, the court held that under a strict construction of the penal law the agency shop contract could not be considered to be covered by the Indiana act by implication. *Meade Electric Co. v. Hagberg*, 159 N.E. 2d 408 (Ind. App., 1959).

While the Agency Shop Contract as a type of labor union contract was not in vogue at the time of the enactment of Article 5154a, the Legislature certainly intended to cover this type of contract when it enacted Section 8a of Article 5154a, by whatever name it came to be called in later years. But aside from Article 5154a, the agency shop contract violates Section 2 of Article 5207a and Section 1 of Article 5154g, since the required payment of the service charge is tantamount to compulsory membership in a labor union, and upon failure to pay the service charge, results in loss of the non-union worker's job, if the contract is enforced. The payment of the service charge makes the non-union member subject to all of the pecuniary liabilities of the union member, without any corresponding privileges. He is, in effect, a disenfranchised union member against his will.

In *A. F. of L. v. Mann*, 188 S.W. 2d 276 (Civ. App., 1945) the Court was called on to construe Article 5154a. In construing Section 8a of Art. 5154a, the Court referred to closed shop contracts, and the arguments made by appellants that the fee charged against non-union workers was a part of the cost to such union in obtaining and maintaining union conditions and servicing the employees on the job.

Indicative of the intent of the Court to apply Section 8a to more than the closed shop contract is the following language at page 285:

> "* * * enforced collection by unions from non-union employees for such benefits as a right to work is another matter, Carried to its logical conclusion, the same reasoning would justify such exactions on any job wherein unions are involved, *whether under closed-shop contracts or not;* and ultimately could lead to the same policy toward all labor, on the ground that all labor had benefited from union efforts. Thus the public interest is so affected by the practice prohibited in Sec. 8a, and the potential abuses and injustices to laborers who are not members of an organized union, whether from choice or inability to become so, that the Legislature was warranted in forbidding such practice. (Emphasis added).

If any Texas statutes affecting labor do not apply in any given situation, it will be because the Congress has preempted the field with its own legislation with regard to the particular facts of the case. Certain acts and conduct, such as peaceful picketing of an employer's place of business in an industry affecting interstate commerce, has been held by the Supreme Court of Texas, in *Ex Parte Twedell*, 309 S.W. 2d 834 (1958), to lie outside the jurisdiction of our state courts. But membership in a union as a prerequisite to obtaining or holding a job is a different matter. Congress has made an exemption in favor of the states in the Labor Management Relations Act, 1947, in 29 U.S.C.A. Sec. 164 (b), which reads as follows:

> "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

In *Finney et al v. Hawkins*, 54 S.E. 2d 872, the Supreme Court of Appeals of Virginia was called upon to construe

Virginia's "Right-to-Work" law, Section 1 of which reads as follows:

> "It is hereby declared to be the public policy of Virginia that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization."

The Virginia court stated in the *Finney* case at page 877:

> "As pointed out in the state court decisions in State v. Whitaker, (45 S.E. 2d 860) * * *, and Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co., 149 Neb. 507, 31 N.W. 2d 477, recent federal legislation makes clear that Congress did not intend to interfere with the right of States to prohibit agreements requiring membership in a labor organization as a condition of employment. * * * 29 U.S.C.A. Sec. 164 (b)."
>
> "* * * * *
>
> "There was evidence to be found in the acts of many States and of the Federal Congress to support the view that discrimination against employees because they did or did not belong to a union was against the public interest and should not be allowed. Laws merely regulating the union obviously would not accomplish that purpose. Basically, agreements involving such discrimination are hostile to our free enterprise system and to individual liberty of choice and action. Legislation that protects the citizen in his freedom to disagree and to decline an association which a majority would thrust upon him on the ground that it knows what is best for him, does no violence to the spirit of our fundamental law. The protection of minorities is the boast of our institutions and a basis of their asserted superiority over totalitarian regimes. The results have demonstrated the value of the democratic process."

In response to your question, we hold that the "Agency Shop" clause in a contract between a labor union and management contravenes and is in violation of Section 8a of Article 5154a; Section 2 of Article 5207a; and Section 1 of Article 5154g of Vernon's Civil Statutes.

SUMMARY

The "Agency Shop" clause in a contract between a labor union and management violates Sec. 8a, Art. 5154a; Sec. 2, Art. 5207a; and Sec. 1, Art. 5154g, V.C.S.

Yours very truly,

WILL WILSON
Attorney General of Texas

By /s/ RILEY EUGENE FLETCHER
Riley Eugene Fletcher
Assistant

APPROVED:

OPINION COMMITTEE
W. V. Geppert, Chairman
Joe McMaster
Jack Price
Martin DeStefano
Raymond Loftin

REVIEWED FOR THE ATTORNEY GENERAL

By: Morgan Nesbitt

A-8

THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

CRAWFORD C. MARTIN
ATTORNEY GENERAL

NOLA WHITE
FIRST ASSISTANT

January 20, 1972

Hon. James W. Hambright
Orgain, Bell & Tucker
Attorneys at Law
Beaumont Savings Building
Beaumont, Texas 77701

Re: Attorney General Opinion
No. WW-1018

Dear Jim:

Regarding the inquiry contained in your letter of January 19 with reference to the above Opinion, please be advised that this office has not written any other Opinion on the particular subject involved in WW-1018. For this reason, it is our feeling that this Opinion is still in full force and effect.

It might be pertinent, however, to say that if a railroad is involved wherein the Federal Railroad Labor Act controls, under the decision of *International Association of Machinists v. Sandsberry*, 277 S.W. 2d 776 (Tex. Civ. App. 1955), aff. 156 T. 340, 295 S.W. 2d 412, cert. den. 353 U.S. 918, our Opinion would not be of any force or effect as against the Federal Railroad Labor Act.

It is always a pleasure for me, as well as for this office, to be of service to you and your fine firm. Please do not hesitate to call on us if we can help in any way.

Kind personal regards and every good wish, I am

Sincerely yours,

/s/ NOLA WHITE
Nola White
First Assistant